In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 566

RAILROAD RETIREMENT BOARD ET AL., PETITIONERS

v.

THE ALTON RAILROAD COMPANY ET AL.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR PETITIONERS

Respondents' brief rests their attack on the constitutionality of the Railroad Retirement Act on grounds which have been anticipated and considered in petitioners' main brief. A detailed reply to respondents' contentions seems unnecessary. But the issues will be sharpened by a concise summary of the positions of the parties, together with comments also upon certain contentions of respondents which, it is believed, are not well founded.

120018—35——1

I

POWER OF CONGRESS

Petitioners' brief supports the Railroad Retirement Act as a reasonable exercise of Congressional power under the commerce clause on the ground that the Act is reasonably calculated to promote efficiency, safety, and economy in interstate transportation, to improve labor conditions and labor relations in the industry, and to foster and protect the national transportation system. Respondents do not deny that Congress has the power to legislate for these purposes. They concede (Brief, p. 17) that "The announced purpose of promotion of efficiency and safety in interstate transportation is within the commerce power if that purpose be genuine", but they assert that this purpose, stated in Section 2 (a) of the Act, is not genuine.

That the stated purpose is genuine and that the Act is reasonably calculated to achieve the above aims is demonstrated in detail in petitioners' main brief. The retirement and annuity system established by the Act will remove superannuation from the industry; will safeguard the industry (with its peculiar tendency toward superannuation) against such conditions in the future; will open opportunities for employment of vigorous younger men and for the advancement of employees in service; will remove or reduce employees' worry over their support in old age; will tend to improve labor relations; will promote continuity of employ-

ment in the industry; will safeguard against uneconomic expenditures through "hidden" pensions to inefficient aged workers retained on pay rolls, and through inadequate pension systems; will avoid the consequences of the threatened breakdown of the existing voluntary systems; and will make possible railroad rehabilitation through coordination, by removing obstacles interposed by humane considerations, labor opposition and section 7 (b) of Emergency Railroad Transportation Act, 1933. In all these ways, the Retirement Act promotes efficiency, safety and economy and makes for a more adequate national transportation system.

Despite this variety of influences for efficiency, safety, and economy, respondents assert (Brief, p. 22) that petitioners' argument "depends on the assertion of one or both of two theories * * * to establish any relation to efficiency or safety": (1) that the Act is reasonably calculated to accomplish the elimination of "asserted excessive superannuation among railroad employees"; (2) that the "assurance of future pensions will have a present effect in ease of mind and removal of fear of old-age dependency, thus creating a state of mental contentment of employees, which, it is asserted, will tend to contribute to the efficiency of their work." They then urge (1) that in its very nature and provisions the Act has no relation to efficiency and safety, (2) that the "theory of elimination of superannuation fails as a basis of constitutional power"; and (3)

that what they call the "contentment theory" gives the Act no real or reasonable relation to efficiency or safety.

1. *Nature and provisions of the Act.*—Respondents' argument on this point is based on a distorted and incomplete view of some features of the Act. They assert that the Act promises pensions to over 1,000,000 men who "are not even employed by the carriers." (Brief, p. 20.) But there is no reason for segregating this number from all other persons who will be employed by respondents in the future; pensions will accrue to all of them only in the event of future employment and service.

Respondents assert further that the lack of relationship to efficiency and safety is shown by the fact that annuities are payable at age 65 to employees who are separated from service prior to that age either voluntarily or by discharge (Brief p. 21). This objection isolates an established incident of sound retirement plans and ignores its function in the whole. The objection focuses attention on the time of the pension payments and does not consider the effect during the years of employment prior to their commencement. It considers the effect on the specific individual receiving the pension without taking into account the effect on the personnel generally. As stated in petitioners' main brief, the pension in any case is measured by the years actually spent in service. Allowance for the retention of pension credits after separation from service has recently been recom-

mended as "a progressive step toward assuring the benefits of employee retirement annuities" (Petitioners' brief, p. 133).

It is a reasonable incident designed to prevent pension plans from being illusory, to give to the employees generally assurance, conducive to efficiency during their employment, that their pension credits are real, and to avoid unjustly penalizing separations from service by forfeiture of earned credits.

2. *Elimination of Superannuation.*—Respondents deny that there is presently an excess of superannuation in the railroad industry. Seizing on the word "probably" in the Coordinator's affidavit they attack his statement as a mere opinion. That their charge is unwarranted is shown in the Coordinator's Report of January 21, 1935, where the Coordinator unequivocally states that the superannuation is excessive and supports his statement with undeniable facts (Report of the Federal Coordinator of Transportation, 1934, House Document No. 89, 74th Congress, 1st Sess., p. 80). Without challenging the validity of the data showing that superannuation in the railroad industry is greater than that in comparable industries, the respondents rely merely on comparisons with non-comparable industries (Respondents' Brief, p. 25; see Petitioners' Brief, p. 66), and with occupations such as grocers, hucksters, peddlers, and others (The 15th Census of the United States, 1930, v. 5, pp. 130–133). On the basis of careful study, the

Coordinator (Report of the Federal Coordinator, *supra*, p. 80) states:

> The average age of railroad employees is higher, and the proportion of those aged 65 and over is greater, than for any other major industrial group. Other conclusions may be drawn from age data collected by the United States Census of 1930; but such conclusions would be based on an incorrect use of census materials, and contrary to fact.

The evidence that the percent of superannuation in the railroad industry has been increasing, that it is now larger than it ever has been in the past, that the average age of railroad employees is higher than that in other industries, that the railroad industry, because of its age, tradition and employment rules, is peculiarly subject to a tendency toward superannuation, is not denied. At best respondents' contention is that superannuation in the railroad industry is not greater than that in certain other industries.

Respondents object that no point can reasonably be made with respect to the percentage of superannuation during the recent depression years, which, they say (Brief, p. 26) "does not indicate the condition of the industry during the period for which the act is to obtain—all time to come." But the Coordinator's Report (p. 80) shows that the tendency toward excessive superannuation is inherent in the railroad industry, and that the depression "merely hastened the inevitable."

Respondents contend further that removal from service on the basis of mere age has no reasonable relation to either efficiency or safety (Brief, p. 23). The contention is contrary to long industrial experience and the respondents' own practice. The Retirement Act requires retirement at age 65, permitting extension, however, by consent of employer and employee until age 70. The evidence discloses that these ages are those commonly fixed for retirement under the voluntary industrial pension plans generally. Many of respondents make retirement compulsory on the basis of mere age (R. 197 and attached statement). Respondents, indeed, point to the fact that 56 of them, employing 62.9% of all railroad labor had, on the passage of the Act, no employees over age 70 (Respondents' Brief, p. 8). The judgment of Congress in accord with this experience cannot be impugned.

But respondents urge that if the removal of old employees is conducive to efficiency and safety, retirement alone would accomplish that result and the further requirement of pensions has no relation to it and is beyond the power of Congress (Brief, p. 33). As has been shown (Petitioners' Brief, pp. 90–91) compulsory retirement is, as a practical matter, inseparable from provision for pensions. If Congress has power to require retirement it has power to do so in a practicable manner. A power which cannot be exercised in a feasible way is wholly illusory. The respondents' argument is in

the teeth of the classic language of the *Second Employers' Liability Cases*, 223 U. S. 1, 47, frequently repeated by this Court, that the power to regulate commerce is the power to foster, preserve, protect, and control "with appropriate regard for the welfare of those who are immediately concerned * * *." On respondents' analysis, the Adamson Act should have been declared invalid in *Wilson* v. *New*, 243 U. S. 332, because the power of Congress to avoid the crisis there threatened was confined to a prohibition of the impending strike; there the statute did not prohibit the strike, but instead fixed wages and hours of labor. Moreover, respondents' contention disregards the beneficial effects of a retirement and annuity system listed above—effects depending upon the payment of pensions and not alone upon retirement.

3. *The So-called "Contentment Theory."*—This theory which respondents attribute to petitioners and characterize as fanciful is respondents' own creation. Their attempt to reduce the record, and petitioners' brief, to a contention that efficiency will be promoted simply through "mere general contentment" discloses a failure to appreciate the diversity of influences, exerted by a retirement system, toward improvement of employee personnel and morale. This is illustrated further by their treatment of the quotation from the Industrial Conference Board (Brief, p. 38) where by italicizing the element of "loyalty"—that is, gratitude for a gratuity and fear of losing it through

separation from service—they overlook the other elements emphasized there and detailed above.

Bearing of the Voluntary Plans.—The Government has placed reliance on the voluntary plans for two reasons: first, to show that the Railroad Retirement Act will promote efficiency through features common to such plans and, secondly, to show that Congress did not introduce a retirement and pension system into the railroad industry, but rather acted upon an existing situation and provided for its improvement. Respondents urge that the voluntary plans "furnish no support to the argument that the Act has reasonable relation to efficiency and safety" (Brief, p. 42). They renew their contention that the voluntary plans promote efficiency and safety only through promoting loyalty and continuity of service and that the Act destroys both these features. It has been shown in petitioners' main brief that insofar as respondents concentrate on these two influences they overlook the advantages of pension systems commonly recognized outside of this litigation and assured by the Act.[1]

[1] It is illuminating to compare respondents' contentions in this litigation, as to the severely limited objectives of voluntary pension plans, with the convictions current throughout the years when those plans were being adopted. Thus, among the advantages to the railroad of the Baltimore and Ohio pension system, S. R. Barr, Superintendent of the Relief Department, in a pamphlet entitled, *The Relief Department of the Baltimore & Ohio Railroad Co.; Its Advantages to the Company* (March 12, 1909), stated the following: "The replacement of the pensioned by younger men eliminates the

Furthermore, respondents exaggerate the alleged difference between the Retirement Act and the existing railway pension plans with respect to inducing continuity of service. As was stated in petitioners' main brief (p. 77), the Retirement Act is likely to encourage continuity of service in the industry (at least to the extent [Brief, p. 76] that the voluntary plans have that tendency with respect to individual employers), and if the employee

---

nonproductive labor" (p. 13). "The Pension Feature takes out of the service men who are past giving full value for the wages paid them. The replacement of these by younger men insures the Company a better return for the wages paid. The operating departments are relieved of the burden of carrying these men on their rolls" (p. 24). And see Emory R. Johnson, *Railway Departments for the Relief and Insurance of Employees*, Annals Amer. Acad. Pol. & Soc. Sci., Vol. 6, pp. 424, 443–444 (1895); Samuel M'Cune Lindsay, *Railway Employees in the United States*, Bulletin of the Department of Labor, No. 37, pp. 1023, 1088 (Nov. 1901); Burton J. Hendrick, *The Superannuated Man, Labor Pensions, and the Carnegie Foundation*, McClure's Magazine, Vol. 32 (Dec. 1908), pp. 115–123; U. S. Commissioner of Labor Chas. P. Neill, *Pension Funds for Municipal Employees and Railroad Pension Systems in the United States*, Senate Doc. No. 427, 61st Cong., 2d Sess. (1910); Editorial, *Why Pay Pensions?* Railway Age, Vol. 84 (April 21, 1928), p. 902; J. C. Clark, *Railroad Employees' Pension Plans*, Railway Age, Vol. 80 (April 17, 1926), p. 1063; Pennsylvania Old Age Pension Commission, *The Problem of Old Age Pensions in Industry* (1926), pp. 27, 102, 104; Ingalls Kimball, *Accruing Pensions as a Part of Current Operating Cost*, The Journal of Accountancy (Sept. 1929), pp. 161, 163; Mary Conyngton (U. S. Bureau of Labor Statistics), *Industrial Pensions for Old Age and Disability*, in Old-Age and Disability Pensions (Extracts from Monthly Labor Review), Senate Doc. No. 140, 70th Cong., 1st Sess., 1927–1928, pp. 99, 128.

is to remain in the industry he will probably prefer to remain with the same employer in order to safeguard his seniority rights. Furthermore, it is proper for Congress to consider the effect only of inducing continuity of service in the industry, since Congress is primarily concerned with the industry as a whole.

On the basis of a misinterpretation of section 2 (a) of the Act, and an incomplete view of the Act's operation and effect, respondents urge the Court to override the express statement of legislative purpose and condemn the Act as in reality related "only to broader and unauthorized social purposes." They rely on *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20. In both cases the Court found that the regulation (or tax) was a pretext and a disguise for a regulation of industries not subject to Congressional power. Those cases would be authority here if the Congress had attempted, through the railroads, to impose a retirement system on industries engaged solely in intrastate commerce. But such is not the instant case. Here there is no indirection or pretext. The regulation does not reach beyond the railroad industry. The Act is not to be condemned merely because it will also have desirable social results.

II

POWER OF CONGRESS TO INCLUDE ALL EMPLOYEES

Respondents assert (Brief, p. 48) that the Act is in excess of Congressional power because it is made applicable to all of respondents' employees. Respondents rely solely upon *The Employers' Liability Cases*, 207 U. S. 463, and assert (Brief, p. 62) that petitioners are asking that the Court overrule that case and hold that the mere fact of employment by an interstate carrier is sufficient to give Congress power to regulate the employment relationship even though the employment "has no connection whatever with interstate commerce."

Such is not petitioners' position. The only principle for which petitioners contend is that conceded by respondents (Brief, pp. 52–53) and well established by decisions of this Court, namely, that in regulation of interstate commerce Congress may include such closely related incidents as effective regulation requires even though, isolatedly considered, they might be deemed to be in intrastate commerce. *The Employers' Liability Cases*, consistently with that principle, held only that there was no such close relationship between interstate commerce and a rule of liability of carriers for injuries to employees not engaged therein as to require inclusion of the latter in order to make the regulation effective in interstate commerce. The Railway Labor Act, on the other hand, is an instance in which treatment of a problem on an in-

dustry-wide basis, i. e. application to all employees, was necessary to an effective solution of the problem in interstate commerce. (See Respondents' Brief, p. 61.)

In the main brief for petitioners (p. 93, *et seq.*) it has been shown that a sound, adequate, and effective retirement system in interstate transportation can be established only by treating the industry as a whole. Here, as in *Transit Commission* v. *United States*, 289 U. S. 121, 127, "multiple control" would be "detrimental to the public interest as well as to the carriers. Dominant federal action [is] imperatively called for."

III

PRIOR SERVICE

Respondents contend that the Act is invalid because in the computation of annuities, service rendered prior to its enactment, as well as service rendered thereafter, is counted. They attempt to support this contention by urging that the cost of paying annuities "may not be laid on the past" and that "the power to regulate interstate commerce * * * cannot include a *post mortem* regulation of past commerce" (Brief, p. 68). But this has no relevance to the Retirement Act. The Act obviously places no burden upon the past. The cost of the retirement system set up by the Act must be met by *present* and *future* contributions to to the railroad retirement fund and these are based

on present and future pay rolls, which reflect present and future operations. Just as plainly, the Act does not purport to regulate "past commerce." Its regulation has to do solely with the present and the future and its object is solely present and future benefits.

Respondents urge that because of the inclusion of service rendered prior to the enactment of the Act they will be made to pay large additional sums of money. Petitioners' main brief discloses the fallacy of this contention. Respondents are required to contribute not *for* prior service, but to meet the cost of securing present and future benefits from a sound retirement and annuity system.[2] The computation of annuities on the basis of service periods results in the payment of small pensions to employees with short service periods and reduces the cost that would be incurred if adequate minimum pensions were required to be paid to *all* employees. But the service basis is generally

[2] That the costs of annuities attributable to prior service must be borne by the employer was recognized in connection with the Federal civil service retirement system. In a report of a committee of the House of Representatives it was pointed out that since persons who retire shortly after the taking effect of the retirement plan will have contributed during but a small fraction of their time in service, "the Government in their cases must pay not only its normal share of the annuities, but the deficiency occasioned by the lack of full contributions throughout the periods of service upon which the annuities are based. This initial deficiency cost is unavoidable in the inauguration of a retirement system." House Report No. 394, 68th Cong., 1st Sess., p. 2.)

adopted because it differentiates fairly between employees and is at the same time fair to the employer. Respondents would retain the service period feature, but would exclude from it prior service. Such a method, involving, as it would, compulsory retirement without any annuity for large numbers who would be required to retire in the immediate future, would not only postpone for a generation the full effectiveness of a retirement system, but might, in the meantime, affirmatively disrupt labor relations in the industry and endanger the continuity of interstate transportation. For reasons of this kind, employers on the voluntary institution of retirement and pension plans have included prior service (R. 185).

IV

POOLING

Respondents assert (Brief, p. 76) that the Act is invalid "in that it unlawfully undertakes to mingle and pool the resources and obligations of the carriers." However, this objection is settled by the decisions of this Court in *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, and *Noble State Bank* v. *Haskell*, 219 U. S. 104. Respondents attempt to distinguish those cases on the ground that there inequality of operation was purely conjectural whereas such inequality is proved in the present case (Respondents' Brief, pp. 81–83). No such distinction exists. In both of the cited cases,

the Court's decision proceeded on the express premise that each individual participant in the pool was subjected to the risk of contributing a greater amount to the fund than the liabilities accruing to the fund as a result of that participant's operation.[3] Respondents under the Act are subjected to the same chances. But that is all. Their so-called proof of inequality is confined to a showing that on or about September 15, 1934 some carriers had employees aged 70 or over while others did not—a fact which does not show equality or inequality in the operation of the Act.

Even if it were assumed that age of employees is the controlling measure of annuity costs, inequality in distribution of employees of 70 and over at a particular time could give rise to no inference as to inequality of operation. There is no evidence as to distribution of employees aged 69, 68, 67, 66, and 65, all of whom must retire under the Act in the absence of extension by agreement. For all that

---

[3] *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 236–237: "But the Washington law goes further, in that the enforced contributions of the employer are to be made whether injuries have befallen his own employees or not, so that however prudently one may manage his business, even to the point of immunity to his employees from accidental injury or death, he nevertheless is required to make periodical contributions to a fund for making compensation to the injured employees of his perhaps negligent competitors."

Noble State Bank v. *Haskell*, 219 U. S. 104, 10: "• • • still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business."

appears the distribution of those over 70 may even now be completely reversed through birthdays since respondents' figures were compiled; or the carriers having 70-year-old men may actually retire fewer employees this year than those not having them.

But the essential fallacy in respondents' argument is disclosed (Brief, p. 77) in the statement: "Age of employees to a controlling degree will measure mathematically the burden which the Act creates in respect of the employees of any individual employer." In this assertion respondents are in error. The burden in respect of the employees of any individual employer depends largely upon years of service (not age), average compensation, and length of life after retirement of such employees. That these factors are likely to cause inequalities among respondents is unproved and unknown.[4] If respondents had been aware of the relative unimportance of age they could not have attributed significance (Brief, p. 77) to the less than six-year maximum variation in the "most

[4] The age of particular employees may affect to some extent the burden imposed by the Act in respect of such employees, but only because of its bearing upon the probability of withdrawal or death before attaining retirement age. And before the burden imposed by the Act in respect of the employees of any carrier could be ascertained it would be necessary to consider, in addition to the factors already mentioned, age of employees to be taken into service, mortality rate in service, rate of withdrawal, permanent and total disability rate, retirement rate, rate of salary change, and rate of transfer between carriers.

probable" age of entry into the service as shown by the figures introduced by petitioners (R. 189).

V

THE SO-CALLED "UNCONSCIONABLE COST"

Respondents seek to have the Act declared invalid on the ground that its cost to the carriers will be unduly burdensome at the present time. If the Retirement Act is within the power of Congress under the commerce clause, the propriety of its passage at the present time is a question of Congressional wisdom or policy, provided that Congress did not act arbitrarily or capriciously. Congress did not act in disregard of the facts bearing upon the financial condition of the carriers. As indicated in petitioners' brief (pp. 148–149), not only were these facts matters of common knowledge, but they were specifically before Congress at the time of the enactment of the Emergency Transportation Act of 1933 whereunder Congress undertook to provide ways and means of improving the condition of the carriers, and at the time of passage of the Reconstruction Finance Corporation Act (c. 8, 47 Stat. 5) wherein Congress provided for the lending of money to the railroads. That Congress took carrier conditions into consideration in drafting the Retirement Act is evidenced by a statement in the Senate Committee Report (Sen. Rep. 974, 72nd Cong., 2nd Sess., p. 4) that: "The substitute bill aims at this time and during the 4 years' experience period to impose the least possible burden on the railroads and the employees. It pro-

poses to meet current obligations, in the payment of annuities to employees who shall retire under those provisions, from current contributions during such experience period."

Though the depression may have greatly reduced the incomes of the carriers, it had also made serious inroads upon the economic security of railway employees. Investigation of the "earnings and standard of living" of a thousand typical railway employees during the depression, conducted under the supervision of the Department of Labor, the results of which are printed in the record (R. 219 *et seq.*) revealed that the depression has brought about for "veteran railway men" "a slow retreat from relative security toward destitution." The study showed that in 1932, two-thirds of such employees had received less than $1,500; three-eighths, less than $1,000; and one-tenth, less than $500 annual wages. The demoralizing effect of this upon the employees and the probable consequences thereof upon the efficiency of the transportation service were circumstances which Congress may well have considered. The concern of Congress over the effect upon the efficiency of the transportation service of existing labor relations and conditions is expressly shown in Section 13 of the Emergency Transportation Act of 1933, calling for a study of ways and means of improving such conditions and relations in the interest, as the Section provides, of "improving transportation conditions throughout the country."

The fact also appeared that the carriers were already expending in excess of $30,000,000 annually upon pension plans which were unsatisfactory to the employees and which Congress believed to be defective. (Petitioners' brief, p. 90.) Also Congress was aware that in other industries many millions of dollars were being expended annually as pension costs throughout the depression years. The industries paying these sums presumably did not regard the expenditures as a burden but rather as beneficial since they were making the payments voluntarily.

Furthermore, the extent of the burden imposed upon the carriers by the Retirement Act is exaggerated by them. Mr. Eastman stated (R. 161–162) that the Retirement Act will "not be so much of a burden upon the railroads as they would have the country believe." If the total costs of the Act seem large, this is only because it deals with one of the greatest industries, the annual wage bill of which alone is $1,500,000,000, as compared with the total cost of the Retirement Act to the carriers during the first year of $60,000,000. The latter sum is but 2% of the operating revenues of Class I carriers in the low year of 1932 ($3,161,934,711, Interstate Commerce Commission, *Statistics of Railways*, 1932, p. S–55). The total cost of the Act to the carriers attributable to prior service, so much emphasized by respondents, amounting to $2,943,966,000 (R. 209), payable, however, over a period of 80 years, is to be compared with the probable total

wage bill throughout the same period of $125,000,000,000 or more. A fairer comparative test of the burden, the amounts of individual annuities payable under the Act, reveals that the Act is not extravagant but that, on the contrary, the annuities are moderate—lower, as has been indicated (Petitioners' brief, p. 69), than annuities under industrial pension plans generally.

The assertions of the respondents with reference to the burden of the Act are, it is to be noted, based upon their own assumption that the necessary expenditures will be outlay only, without resultant benefit to themselves. But, as has been demonstrated, the whole theory of the Act is that it will be beneficial to the carriers through improvement of the efficiency of the personnel: as has been shown, actual pay-roll savings are likely to result and will to that extent reduce the gross outlay required by the Act. Respondents also ignore the very real possibility that over a period of time the expenditures required by the Retirement Act will be absorbed, in whole or in part, in the course of future wage negotiations; that the carriers will rely upon the costs of the Retirement Act in such negotiations may be assumed.

VI

COORDINATION

Respondents' brief omits any mention of the place of the Railroad Retirement Act in the general plan of rehabilitation of the railroads. Re-

spondents complain of what they call the "unconscionable cost" of the retirement system established by the Act, but they do not consider the economies which it makes possible.

Whatever other measures may be desirable, it is generally conceded that rehabilitation of the railroad industry requires the coordination of railroad activities. Such was the express finding of Congress in the Emergency Railroad Transportation Act, 1933, and its express purpose in establishing the office of Federal Coordinator of Transportation. Pursuant to the direction contained in that Act the Coordinator has instituted extensive studies of what coordination is possible and practicable to improve the efficiency and the adequacy of the national transportation system (R. 158–160; see also Report of the Federal Coordinator of Transportation, 1934, p. 6). The studies already made public disclose highly practicable opportunities for coordination which would result in vast savings and in increased railroad revenues. Thus the Coordinator's Section of Regional Coordination reports that economies of as much as $50,000,000 a year can be effected by coordination of terminal facilities alone, and that an additional saving of $23,350,000 per year in terminal expense would result from coordination of the movement and facilities in package freight (Report on Economy Possibilities of Regional Coordination Projects, Federal Coordinator of Transportation, pp. II, 2, 14–15). These econ-

omies are exclusive of other large savings which have not yet been definitely computed but which would result from the abandonment of unnecessary trackage in the case of parallel lines, and the coordination of back shops, general repair plants, and ticket offices (*Ibid*, pp. 19–24). The Coordinator's Section of Car Pooling reports that the elimination through coordination of "excess" empty car movement would result in operating savings of $75,000,000 per year, and that the savings in capital-carrying charges possible through coordination of operation and purchases is estimated at $25,000,000 more per year (Report on Freight Car Pooling with Plan for Proposed Box Car Pool, Federal Coordinator of Transportation, p. 3). The Merchandise Traffic Section reports that suggested coordination with respect to merchandise traffic can result in economies aggregating over $100,000,000 per year (Merchandise Traffic Report, Federal Coordinator of Transportation, pp. (1), 12–16).

It is very plain, however, and it was plain to the Congress when the Emergency Railroad Transportation Act was passed, that coordination of railroad activities would be largely at the expense of railroad labor.[3] Some plan to deal fairly with

[3] The Coordinator's study of terminal coordination at Kansas City disclosed savings through coordination of $2,081,699 per year. Of this amount 67% would be savings in labor costs (Report of Federal Coordinator of Transportation, 1934, p. 99).

railroad labor in this connection is essential for humane and practical reasons and to avoid aggravation of the serious problem of unemployment." This is manifest from the provisions of Section 7 (b) of the Emergency Railroad Transportation Act, 1933, providing that the "number of employees in the service of the carriers shall not be reduced by reason of any action taken pursuant to the authority of this title below the number as shown by the pay roll of employees in service during the month of May 1933", with some provision for variation. The Retirement Act is essential if coordination is to be made practicable (R. 204–205; Report of Federal Coordinator of Transportation, 1934, p. 66).

"'A further material reduction in railroad employment under present conditions, coming on top of the severe reductions already made, would have deplorable results. In most instances the men displaced would not be able to find substitute employment. The mere discussion at the present time of railroad coordination and the possibilities of economy which it offers has terrified many railroad employees, and the fear has penetrated even further, for such projects would affect officers as well as men.

"The railroads, and the country, are therefore faced with a dilemma. Unless costs can be reduced and operation, equipment, and service improved, it will be difficult to arrest the retrograde movement and place the railroads in a position to thrive and grow. On the other hand, if men are displaced in large numbers at this juncture without protection, serious suffering will be caused and the morale of the service will be gravely impaired" (Report of Federal Coordinator of Transportation, 1934, p. 34).

These considerations bear upon the issues in this case in several ways. Viewed as an incident of the coordination of railroad activities, the Act is within the powers of Congress. From the standpoint of necessity for coordination it is also clear that the Act ought to apply to all railroad employees and not exclude employees in the very activities which are coordinated (Cf. *Texas* v. *United States*, 292 U. S. 522). And the alleged "unconscionable cost" of the retirement system disappears in view of the economies through coordination which it makes practicable (Petitioners' Brief, p. 151 *et seq.*).

VII

SEPARABILITY

Petitioners believe that the Act is valid in all its provisions. Respondents assume, however, that if this Court should hold any provision of the Act unconstitutional, the whole must fall. This assumption is wholly unwarranted.

Section 14 of the Act provides that "If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act or application of such provision to other persons or circumstances shall not be affected thereby."

This section is clearly applicable, as the Court below held, to section 1 (b) of the Act defining the term "employee" so as to include employees in

actual service within one year prior to the enactment of the Act. Should this Court conclude that these employees cannot constitutionally be included, the words "who has been in such service within one year before the enactment hereof" can be deleted from section 1 (b) without affecting in any way the rest of the sentence or of the Act. And surely the Congress could not have intended the whole Act to hinge upon the inclusion of these comparatively few employees.

The separability section is equally applicable to inclusion of employees claimed by respondents not to be subject to Congressional control. This is true for the reason that the separability clause creates a presumption that Congress intended the Act to stand with respect to the four-fifths of respondents' employees, if it should be declared invalid with respect to the one-fifth. Furthermore, Congress did not adopt the Act in ignorance of the respondents' claim as to the effect of *The Employers' Liability Cases*. The claim was made by opponents of the legislation and answered by its proponents at the Congressional hearings. (See Hearings Before a Sub-Committee on Interstate Commerce on S. 3892 and S. 4646, 72nd Cong., 2nd Sess., pp. 23, 412–415, 420–421; Hearings on S. 3231, 73rd Cong., 2nd Sess., p. 132.) Congress determined that the inclusion of all employees was necessary and proper. But in anticipation of just

such an attack on the constitutionality of the Act as is here made, the Congress adopted Section 14 in terms peculiarly apt for the exclusion of such employees as this Court should hold, if it should so hold, are not subject to the commerce power. In similar manner, State workmen's compensation acts in terms applicable to *all* employees have been invalidated with respect to railroad employees injured while engaged in interstate commerce but upheld with respect to the remaining employees. (See, for example, *Arnbury* v. *Boston & Maine R. R.*, 276 Mass. 418, 420; 285 U. S. 234.)

Petitioners believe that, apart from other considerations, the practical difficulties of differentiating between railroad employees, for the purposes of a retirement system, on the basis of work in interstate and intrastate commerce are so great as to warrant Congressional action with respect to all employees. If, however, respondents are right in their contention (Brief, p. 62) that "under the proof in this case over 200,000 present employees of respondents (and all like employees in the future) are shown to be in classes where this assumed difficulty could not arise," then there is nothing to rebut the presumption of separability and the express declaration that if "the application" of the Act "to any person or circumstances, is held invalid, the remainder of the Act or application of such provision to other persons or circumstances shall not be affected thereby."

It is respectfully submitted that the decree below should be reversed and the cause ordered remanded to the trial court, with directions to dismiss the bill of complaint.

J. CRAWFORD BIGGS,
Solicitor General,
HAROLD M. STEPHENS,
Assistant Attorney General,
CARL MCFARLAND,
HAMMOND E. CHAFFETZ,
Special Assistants to the Attorney General.
HARRY SHULMAN,
Special Counsel,
LESTER P. SCHOENE,
MAX TURNER,
Assistant Counsel,
Railroad Retirement Board.

MARCH 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935